

UNITED STATES OF AMERICA )  
v. )  
Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )  
) GOVERNMENT MOTION  
FOR RECONSIDERATION  
OF COURT'S RULING ON  
DEPARTMENT OF STATE  
DAMAGE ASSESSMENT  
26 April 2012

## RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court reconsider a portion of its ruling, dated 23 March 2012, on the Defense Motion to Compel Discovery. The United States requests the Court make a determination that the draft Department of State damage assessment, and any information contained therein, is not discoverable because of its speculative nature.

## BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. Rule for Courts-Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

## FACTS

In its ruling dated 23 March 2012, the Court ordered the Government to disclose all unclassified and classified information from the Department of State damage assessment to the Court for *in camera* review under RCM 701(g)(2), or claim a privilege with respect to the classified information in the draft damage assessment. The Court also ordered the Government to identify what unclassified and classified information from the draft Department of State damage assessment was favorable to the accused and material to guilt or punishment. In its ruling, the Court found that the draft Department of State damage assessment was relevant and necessary for the Court to conduct an *in camera* review to determine whether it contains information that is favorable to the accused and material to guilt or punishment under Brady v. Maryland, 373 U.S. 83 (1963), or information relevant and favorable to the accused under RCM 701(a)(6).

On 25 April 2012, the Department of State provided a cover letter with the draft assessment for the Court's determination. See Enclosure 1. This letter provides background on the damage assessment, and the prosecution has the authority to disclose the letter to the defense counsel, but not the accused. The Department of State has not authorized the prosecution to disclose Enclosure 2 to the defense or accused, therefore it is submitted to the Court *ex parte*.

## WITNESSES/EVIDENCE

1. Cover Letter, dated 25 April 2012 (classified "CONFIDENTIAL//NOFORN").
2. Enclosure to Cover Letter (classified "SECRET//NOFORN") and submitted *ex parte*.

## LEGAL AUTHORITY AND ARGUMENT

Under RCM 701(g)(2), a military judge may order that discovery be denied. Upon motion of a party, the military judge may permit the party to make such a showing related to discovery, in whole or in part, in writing to be inspected only by the military judge. In this case, the Court has already ruled that the draft Department of State damage assessment be produced for its *in camera* review. The prosecution does not presently have the authority to produce the draft or any portion thereof to the defense or the accused.

A document that is preliminary, challenged, or speculative is not subject to discovery, even if it contains information that is potentially favorable to the accused and material to guilt or punishment. See Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring). The draft damage assessment produced by the Department of State is a preliminary assessment of the damage caused by the WikiLeaks disclosure of Department of State diplomatic cables. See Enclosures 1 and 2. As a draft, the document is preliminary and speculative in nature, which should be apparent when reviewing the actual draft. The document does not represent the current assessment of the Department of State, merely a snapshot during a specific period of time. Although a draft document could contain information which is derived from final products, the draft itself cannot be information favorable to the accused and material to guilt or punishment because it does not in any way represent the current or past final assessment of the Department as a whole, or specific individuals in part.

If the Court finds the draft damage assessment, or any information contained within, is subject to a Brady review, pursuant to the Court's order, dated 23 March 2012, then the prosecution will review the document to identify RCM 701(a)(6) and Brady material and coordinate with the Department of State to meet the Court's 18 May 2012 suspense.

## CONCLUSION

The United States requests the Court reconsider, in part, its Order dated 23 March 2012 with respect to the draft Department of State damage assessment and determine the draft assessment is not discoverable.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs,  
Civilian Defense Counsel, without Enclosure 1, on 26 April 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel